

August 25, 2008

The Honorable John N. Fogleman
Circuit Judge, Second Judicial District
206 River Trace Drive
Marion, Arkansas 72364

Re: Advisory Opinion 2008-05

Dear Judge Fogleman:

You advised that you are currently in office as a circuit judge and that you will be seeking election to the Arkansas Supreme Court in 2010 while still in office in your current capacity. You have asked six questions of our Committee and they will be answered in the order as submitted.

1. “Although Canon 5 C. (2) provides that the “committee of responsible persons” may “solicit contributions and public support” no earlier than 180 days before an election it does not appear that the candidate is restricted by the 180 day period (recognizing that the candidate may never solicit contributions). Is this analysis correct?”

Under the Code as is now exists, your analysis is correct. Although the committee may not begin soliciting contributions and public support earlier than 180 days, you may organize the committee prior to that time.

2. “I would note that it appears that Canon 5 was changed in approximately 2001 to remove the prohibition on a candidate from seeking public support. Is this understanding correct?”

Yes. Prior to 2001 Canon 5 (C) (2) prohibited a candidate from “personally soliciting publicly stated support.” That language was removed in the post Amendment 70 amendments. The restriction is now limited to “personally soliciting or accepting campaign contributions.” A candidate is permitted to approach voters and ask for public support, for instance, by adding their names to an advertisement.

3. "When may an incumbent judge publicly announce his/her candidacy?"

The charge of this Committee is to interpret the Code. The Code as currently in effect does not answer this question.

4. "What does it mean to 'publicly announce' ones candidacy?"

Unfortunately, as you pointed out, the Code as currently in effect does not offer guidance and therefore we cannot give you any definitive advice. There are some instances where this issue has been addressed under specific circumstances. In New York, for instance, it was determined that an appearance by the county chair of a political party asking for endorsement of his candidacy for the Supreme Court constituted a public announcement of candidacy. Opinion 00-11. Since there are almost no guidelines we must address the matter practically. Obviously, when a judge holds a press conference or addresses his candidacy as in the New York instance, that would clearly constitute a publically announced candidacy. Beyond those obvious circumstances there have to be a multitude of occurrences or combinations of events that might constitute a publically announced candidacy.

To address your specific situation, we do consider that your printing and handing out a card entitled "John N. Fogleman for Supreme Court" and giving your telephone numbers and e-mail address would constitute a publically announced candidacy. In the absence of a perfect definition, we would counsel people who have plans to run for a judicial office to conduct themselves as if they were a publically announced candidate.

5. As mentioned before, you have proposed to prepare a card at your own expense for immediate use that states "John N. Fogleman for Supreme Court" and gives your telephone numbers and e-mail address. You stated that you would tell people that you will be seeking a position on the Supreme Court in 2010 and that you would give them this card when asked for your contact information. Your question: "Is this permissible?"

As your research disclosed, there is nothing in the current Code that would prohibit such a card.

6. In the scenario set forth in Number 5 above you ask that if people you approach ask you what they can do to help, "Is it permissible to ask them to contact their friends and acquaintances on my behalf?"

There is nothing in the current Code that would prohibit what you propose.

In June, 2008 the House of Delegates proposed a new Code of Judicial Conduct which should be on the desk of the Supreme Court. Proposed Rule 4.2 B provides some excellent guidance:

"(B) a candidate for elective judicial office may, unless prohibited by law, and not earlier than 365 days before the first applicable election:

- (1) establish a campaign committee pursuant to the provisions of Rule 4.4;
- (2) speak on behalf of his or her candidacy through any medium, including but not limited to advertisements, websites, or other campaign literature;

- (3) [DELETED]
- (4) attend or purchase tickets for dinners or other events sponsored by a political organization;
- (5) seek, accept, or use endorsements from any person or organization other than a partisan political organization; and
- (6) [DELETED]”

Notwithstanding our interpretations above of the Code of Judicial Conduct as currently in effect it is our counsel that you abide by the foregoing provisions of the proposed new code. Accordingly, it is our recommendation that you not issue a press announcement or distribute your cards until 365 days before the election.

Very truly yours,

Edwin Alderson
For the Committee